

2011 WL 2513546 (Minn.) (Appellate Brief)
Supreme Court of Minnesota.

State Senator Warren LIMMER, State Senator Scott J. Newman, State
Senator Sean R. Nienow, State Senator Roger C. Chamberlain, Petitioners,

v.

Lori SWANSON in her official capacity as Attorney General, Mark Dayton in his official capacity
as Governor, Jim Showalter as Commissioner of Department of Management and Budget,
and Kathleen R. Gearin as Chief Judge of the Ramsey County District Court, Respondents.

No. A111107.
June 22, 2011.

Request for Leave of Court to File an Amicus Curiae Brief

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***2 NOTE REGARDING MOTION TO DISMISS**

Aging Services of Minnesota (Aging Services) and Care Providers of Minnesota, Inc. (Care Providers) support the Motion to Dismiss filed by Attorney General Lori Swanson on June 20, 2011 and believe this matter should be resolved in district court. *See Minnesota ex rel. Sviggum v. Ingison, Comm'r of Fin.*, No. A05-1742 (Minn. Sept. 9, 2005) (Blatz, C.J.) (Att'y General Br. in Supp. of Mot. to Dismiss, Attach. 2). The district court has jurisdiction and authority over these matters and has exercised such authority in the past. *Findings of Fact, Conclusions of Law and Order Granting Motion for Temporary Funding*, Ramsey County District Ct. No. C0-05-5928 (Chief Judge G. Johnson, June 23, 2005), attached as Ex. A (without court exhibits); *Findings of Fact, Conclusions of Law and Order Granting Motion for Temporary Funding*, Ramsey County District Ct. No. C9-014725 (Chief Judge L. Cohen, June 29, 2001), attached as Ex. B. Aging Services and Care Providers make this request to file an *amicus curiae* brief in the event the Court chooses to hear this case on the merits.

AUTHORITY FOR REQUEST

Aging Services and Care Providers, on behalf of their members, a private interest, respectfully request leave of the Court to file an *amicus curiae* brief in this matter pursuant to Rule 129 of the Rules of Civil Appellate Procedure. Aging Services and Care Providers also request leave of the court to participate in oral argument.

BACKGROUND

Aging Services and Care Providers are trade associations established in 1967 and 1947, respectively. These organizations collectively have 385 nursing home provider members and 750 senior housing service provider members. Almost all of their providers participate in the state Medicaid program and care for Minnesota's most frail and vulnerable citizens. *3 Approximately 29,852 Minnesota seniors are served by nursing facilities each day, of which 17,269 rely on Medicaid payments for their care.¹ Over 26,000 residents in assisted living facilities rely on **Elderly** Waiver² benefits to pay for their care.³ Each organization represents a widely diverse group of providers, from traditional nursing homes to highly specialized subacute centers and every type of disability services and senior housing provider.

REASONS FOR *AMICUS* SUBMISSION

Aging Services and Care Providers request the Court grant leave to submit an *amicus curiae* brief for the following reasons:

I. Respondents' position is supported and clarified by the *amicus curiae*;

II. Should the district court not be allowed to maintain authority over this matter and determine which services must continue, there will be very severe and unfortunate consequences to Medicaid recipients. In 2010, 56.9% of all resident days in Minnesota nursing facilities were paid by Medicaid. Many providers will not have **financing** sufficient to weather a cessation of government payments: eighty-six Twin Cities metropolitan-area facilities reported a median of 10.8 days of cash on hand.⁴ Should state **financial** support for Minnesota's nursing homes and assisted living facilities be cut off, providers will be forced into the choice of either evicting or involuntarily discharging residents for nonpayment pursuant to 42 U.S.C. § 1396r(c)(2)(A)(v) and Minn. Stat. § 144.651, subd. 29, or providing “free care” for as long as their limited *4 **finances** will allow. As the **financial** data above indicates, providers will not be able to provide this care for long before the downward spiral of events such as missing payroll and an inability to pay vendors for basic necessities such as food for residents will force providers to close. Some residents will be forced to live with family and friends who are unable to meet their needs, while others will simply have no place to go;

III. The vulnerable **elderly**, frail and infirm are not a party to this action, but would be served if the Court allows Aging Services and Care Providers to submit an *amicus* brief. Providers and their residents have aligned interests in this matter, as both would suffer grave injury should Medicaid and other provider payments cease;

IV. Aging Services and Care Providers present a unique perspective in this matter. In their brief, the Petitioners themselves recognize that even absent appropriations some federally sponsored programs could be required to continue pursuant to the Supremacy Clause of the United States Constitution. Pet'rs' Br. at ¶¶ 71 & 76. See U.S. CONST. art. VI, cl. 2. In their brief, the Petitioners show no interest in expanding on what state funding would be required by such federal mandates. See Pet'rs' Br. at ¶¶ 71 & 76. Respondents such as Attorney General Lori Swanson will presumably address the Supremacy Clause issue, but Aging Services and Care Providers will be able to present more detailed information about specific statutes, regulations, and caselaw regarding Medicaid and the Supremacy Clause. Medicaid rights are a serious issue that even the Supreme Court of the United States has addressed, finding federal Medicaid laws confer “an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified.” *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980). Minnesota's courts have also addressed the issue of *5 Medicaid and federal preemption. Aging Services and Care Providers will be able to present these important cases to the Court in a way that neither Petitioners nor Respondents would have the interest or resources to do;

V. Minnesota risks the suspension of its federal Medicaid match should it stop Medicaid payments to providers. This is an issue with serious implications not only for Medicaid providers and Medicaid recipients, but also for Minnesota taxpayers generally. Federal contribution to the Medicaid program is dependent on the State of Minnesota actually spending its matching state share. See *Harris v. McCrae*, 448 U.S. 297, 301 (1980); 42 U.S.C. § 1396b(a)(1). Aging Services and Care Providers have extensive experience dealing with the myriad of Medicaid regulations and would be able to explain the risks Minnesota would face should it unilaterally suspend Medicaid payments to providers;

VI. The issues addressed in the *amicus* brief will not be prejudicial to the Petitioners or the Respondent Attorney General, or any other interested person;

VII. Consideration of the *amicus curiae* will not delay the Court's disposition of this case;

VIII. The *amicus* brief can be submitted pursuant to the timeframe outlined in the Petitioners' Prayer for Relief.

For the reasons above, Aging Services and Care Providers respectfully request leave to participate as *amici curiae* by filing an *amicus* brief. Aging Services and Care Providers also request leave for time to present oral argument.

Footnotes

- 1 2009 Minnesota Department of Human Services data
- 2 “Home- and community-based waiver programs, such as Minnesota’s **Elderly** Waiver (EW), Community Alternatives for Disabled Individuals (CADI), Community Alternative Care (CAC), Traumatic Brain Injury(TBI), and Developmental Disabilities (DD) programs], allow persons who would otherwise be eligible to receive Medicaid benefits in a traditional institution to instead obtain care in their homes or in community-based residences. *Young v. Jesson*, No. A10-1303 (Minn. Ct. App., Apr. 12,2011), citing *Ball v. Rodgers*, 492 F.3d 1094, 1098 (9th Cir. 2007); see also Minn. Stat. § 256B.0915.
- 3 2008 Minnesota Department of Human Services data.
- 4 “**Financial** Condition of Minnesota’s Nursing Facilities: 2010,” data collected, analyzed, and reported by Larson Allen, LLP (April 2011). This figure is based on the responses of 248 facilities to a survey mailed in January 2011.

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